Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JANE PORTER-COOPER,
Petitioner/Appellant,

vs.

DALKON SHIELD CLAIMANTS TRUST,
Respondent/Appellee.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a trial judge deprive a plaintiff in a product liability case of her Seventh Amendment right to a trial by jury when, in clear violation of FRCP39(a), he (1) precludes jury consideration of the defendant's negligence, the product's defects, defendant's knowledge of the product's defects, and proximate cause, (2) makes no findings, himself, on those issues, and (3) instructs the jury on the issues of cause-in-fact and damages, only?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Jurisdictional Statement	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	4
Reasons Why the Question Presented is Substantial	6
Conclusion	9
Appendix	A-1

TABLE OF AUTHORITIES

Page

Constitutional Provision:

The Seventh Amendment to the Constitution of the United States of America 2

Federal Statutes:

Federal Rules of Civil Procedure 38 and 39 2

United States Supreme Court Cases:

Jacob v. New York, 315 US 752 (1941) 6

Galloway v. United States, 319 US 372 (1943) 6

Dimick v. Scheidt, 293 US 474 (1935) 6

Parklane Hosiery v. Shore, 439 US 322 (1990) 8

Satterwhite v. Texas, 486 US 249 (1988) 8

United States Court of Appeals Case:

Padovani v. Bruchhausen, 293 F.2d 546 (2nd Cir., 1961) 4

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DALKON SHIELD CLAIMANTS TRUST,
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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE GROUNDS ON WHICH THIS COURT HAS JURISDICTION

This matter comes before this Court for relief from the decision of the Court of Appeals for the Eighth Circuit, dated January 9, 1995, rehearing denied February 14, 1995. This decision is unofficially reported at 1995 WL 104335. The decision affirmed the trial court's denial of Plaintiff's Motion for New Trial. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT VII. (1791)

In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FED R. CIV. PROC. 38:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days of service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the

party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

FED R. CIV. PROC. 39:

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, not withstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

STATEMENT OF THE CASE

Petitioner, Jane Porter-Cooper (hereinafter "Porter-Cooper") seeks a new trial. The trial court divested Porter-Cooper of her Seventh Amendment right when it precluded jury consideration of a substantial part of her case.[1]

Porter-Cooper suffered severe injuries caused directly by two Dalkon Shields.[2] In 1974, three years after the first Dalkon Shield was inserted, Porter-Cooper experienced a serious and painful episode of pelvic inflammatory disease (PID). In 1976, the second Dalkon Shield, inserted shortly after removal of the first, also caused PID and forced Porter-Cooper to undergo a total abdominal hysterectomy.

Importantly, throughout Porter-Cooper's use of the Dalkon Shield, A.H. Robins had learned that its Dalkon Shield caused PID by carrying infectious fluids into the uterus.[3] Porter-Cooper pleaded, and was ready to prove, facts related to the Dalkon Shield's defects.

A federal bankruptcy court in Virginia stayed Porter-Cooper's suit until August 1993, nine (9) years after being filed. The bankruptcy proceeding spawned the "Dalkon Shield Claimants' Trust" (DSCT).

When the stay was lifted on Porter-Cooper's suit, she

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[1]"Preclusion orders" are not authorized by federal law. See, e.g., Padovani v. Bruchhausen, 293 F. 2d 546 (2nd Cir., 1961).

[2]The Dalkon Shield was an intrauterine contraceptive device (IUD) made and sold by A.H. Robins Company. Porter-Cooper filed a multi-count complaint, alleging (1) strict liability (2) negligence (3) failure to warn (4) warranty. The District Court had diversity jurisdiction, 28 U.S.C. § 1332.

[3]The nature and extent of A.H. Robin's knowledge and its failure to share that knowledge with users and physicians is extensively covered in judicial opinions, popular books and newspapers.

amended her complaint to substitute DSCT as Defendant and struck her claim for punitive damages.[4] DSCT answered with a general denial of all allegations and demanded a jury trial "on all issues so triable".[5] Later, DSCT filed its "Motion in Limine to Narrow the Factual Issues and Expedite Trial," which urged the court to limit the issues at trial to medical causation and damages. DSCT did not offer to withdraw its demand for a jury trial.

Before trial, the trial judge granted DSCT's motion "inasmuch as Plaintiff is unable to recover ...punitive or similar damages" pursuant to the bankruptcy court's order.[6] Later, he instructed the jury on medical causation (cause-in-fact) and damages, only.

In similar cases involving the Dalkon Shield, juries have awarded plaintiffs millions of dollars in actual damages for loss of organs. As a direct result of the trial court's preclusion order, the jury awarded Porter-Cooper a negligible $20,000.

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[4]This action was required by the bankruptcy court as a condition precedent to lifting the stay. Porter-Cooper, in her amended complaint, alleged (1) strict liability (2) negligence (3) failure to warn (4) warranty and (5) fraud.

[5]Such a demand could not be withdrawn by the DSCT without Porter-Cooper's consent. FRCP 38(d).

[6]The trial court's order, lawfully, could only have been based upon (1) stipulation of the parties consenting to a bench trial or (2) a provision of the Constitution or Statute of the United States barring a jury trial. FRCP 39 (a).

REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

The right of Porter-Cooper to a trial by jury is preserved inviolate by the Seventh Amendment and Federal Rules of Civil Procedure 38 and 39. Ignoring the plain language of federal law, the trial court imposed unconstitutional limitations upon a fundamental right of Porter-Cooper.

Given the current legislative agenda regarding "civil justice reform", the judiciary must preserve and fulfill its role as "guardian" of the fundamental right to a trial by jury. See Jacob v. New York, 315 US 752 (1941) and Galloway v. United States, 319 US 372 (1943):

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

See also, Dimick v. Schiedt, 293 US 474, 486 (1935):

> "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence...any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'"

In this case, the trial court flagrantly violated Porter-Cooper's right to a trial by jury. The Eighth Circuit, instead of scrutinizing the violation "with the utmost care," over-

looked the Seventh Amendment and sanctioned its violation.[7]

A federal trial court cannot take any issue of fact away from the jury without obedience to the specific legislative limitations upon judicial power embodied in Rule 39 of the Federal Rules of Civil Procedure. Here, the trial court took issues of fact away from the jury and completely disregarded these legislative restrictions. The trial court boldly asserted its freedom from Rule 39's limitations:

> "...inasmuch as plaintiff is unable to recover trebled, exemplary, punitive or similar damages pursuant to the Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation." (emphasis supplied)

Adminstrative Order No. 1 states:

> "No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of exemplary, punitive or similar damages, or attorney's fees in any Arbitration or Litigation."

This order was binding, solely, upon Porter-Cooper. It forced her to strike her claim for punitive damages. It did not

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[7]The Eighth Circuit sanctioned the trial court's action by stating that: "The order is consistent with Federal Rule 16(c), which authorizes the court to 'take appropriate action with respect to... the formulation and simplification of the issues... [and] the avoidance of unnecessary proof and of cumulative evidence." The trial court's order, however, went far beyond the boundaries of Rule 16. It severed jury issues from a jury case. Rule 16 does not empower a court to deprive a litigant of her right to trial by jury. The Eighth Circuit's reading of Rule 16 sounds the death knell for the right to a jury trial. The Eighth Circuit's application of Rule 16 to this pretrial order effectively repeals Rules 38 and 39, and cuts the heart out of the Seventh Amendment.

empower the trial court to further whittle-away her right to a trial by jury. A trial judge has the power to firmly instruct a jury against awarding punitive damages where such damages are not authorized. The Seventh Amendent and Rule 39, however, guard against the use of preclusion orders to achieve that (or any other) purpose.

This Court has recognized that "(s)ome constitutional violations, by their very nature, cast so much doubt on the fairness of the trial process, that, as a matter of law, they can never be considered harmless." Satterwhite v. Texas, 486 US 249 (1988). While Satterwhite addressed the Sixth Amendment, Justice Rehnquist has more recently observed:

> "... the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits. The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the fact-finding necessitated by a lawsuit. And that essence is as much a part of the Seventh Amendment's guarantee in civil cases as it is of the Sixth Amendment's guarantee in criminal prosecutions."

Parklane Hosiery v. Shore, 439 US 322, 348 (1990) Justice Rehnquist, dissenting.

What could cast more "doubt on the fairness of the trial process" than a pretrial order which, in clear violation of federal law guaranteeing the right to trial by jury, prevents a civil plaintiff from having a jury decide issues which may be favorable to her? The meager award for loss of female anatomy was the expected, foreseen consequence of an unfair trial process which precluded jury consideration of factual issues potentially favorable to Porter-Cooper.

CONCLUSION

This Court's decision on this Petition for Writ of Certiorari is crucial, not only to the rights of Porter-Cooper, not only to rights of all remaining victims of the Dalkon Shield who seek redress by jury, but to all civil litigants who demand a trial by jury in the federal courts within the Eighth Circuit and beyond.

This Court should grant certiorari to settle the important questions presented by this case. The trial court radically departed from the crystal-clear requirements of federal law and such departure was erroneously sanctioned by the Eighth Circuit. Petitioner urges this Court to exercise its power of supervision to preserve the constitutional right to a trial by jury guaranteed by the Seventh Amendment.

Respectfully Submitted,

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APPENDIX

Page

1. Per Curiam Order of the United States Court of Appeals for The Eighth Circuit affirming the trial court's orders A-2

2. Order (of the trial court) Denying Plaintiff's Motion for a New Trial, to Alter or Amend the Judgment, for Additur, and/or Judgment Notwithstanding the Verdict A-6

3. Order (of the trial court) Granting Dalkon Shield Claimants' Trust's Motion in Limine to Narrow the Factual Issues and Expedite Trial A-7

4. Order of the United States Court of Appeals for the Eighth Circuit Denying Porter-Cooper's Petition for Rehearing A-8

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1887

On Appeal from the United States District Court for the Eastern District of Missouri.

JANE E. PORTER-COOPER,
Plaintiff-Appellant,

v.

DALKON SHIELD CLAIMANTS TRUST,
Defendant-Appellee.

Submitted: November 14, 1994

Filed: January 9, 1995

Before RICHARD S. ARNOLD, Chief Judge,
McMILLIAN, Circuit Judge,
and REAVLEY,* Senior Circuit Judge.

PER CURIAM.

Jane Porter-Cooper sought damages from the Dalkon Shield Claimants Trust (DSCT) for injuries allegedly sustained from two Dalkon Shield intrauterine devices she wore. The jury found that the devices had caused injury to Porter-Cooper and awarded damages. She appeals, arguing that the

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*The HONORABLE THOMAS M. REAVLEY, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

trial court erred in limiting the issues tried to the jury and excluding certain evidence. We affirm.

BACKGROUND

Porter-Cooper wore two Dalkon Shields from 1971 to 1976. She suffered bouts of pelvic inflammatory disease and underwent a hysterectomy. She sued the manufacturer of the device, A.H. Robins Company. Robins filed bankruptcy as a result of Dalkon Shield litigation. The DSCT was created to handle claims relating to the Dalkon Shield. By bankruptcy court order claimants were not allowed to seek punitive damages from the DSCT. Porter-Cooper amended her pleadings to substitute the DSCT as defendant and to delete her claims for punitive damages. She does not claim that the bankruptcy court order is invalid or that it does not limit her recovery to actual damages.

At trial Porter-Cooper claimed that the Dalkon Shields had caused her infections. The DSCT claimed that Porter-Cooper's infections were caused by venereal diseases. It also claimed that the hysterectomy was elective surgery not mandated by the use of the Dalkon Shields, and that Porter-Cooper, unmarried with two children at the time, did not want to have any more children. The jury awarded $20,000 in damages.

DISCUSSION

The DSCT filed a "motion in limine to narrow the factual issues and expedite trial," which the court granted. The motion offered to withdraw Defendant's statute of limitations defense and relieve plaintiff of the burden of proving a tort, and asked that the trial evidence be limited to the issues of causation and damages. Porter-Cooper complains of the court's pretrial order which so limited the trial to

medical causation and damages. Porter-Cooper complains of the court's pretrial order which so limited the trial to medical causation and damages. The order is consistent with Federal Rule 16(c), which authorizes the court to "take appropriate action with respect to... the formulation and simplification of the issues... [and] the avoidance of unnecessary proof and of cumulative evidence..." The timing and extent of Robins' knowledge of Dalkon Shield problems was not relevant in a cause where punitive damages were not recoverable, limitations was not a defense, and the claim was premised on strict product liability.

Couching her argument as a denial of her constitutional right to trial by jury, Cooper complains that she was not allowed to prove that Robins was aware of the dangers and problems with the Shield long before it was removed from the market, after pressure from the FDA. She wanted to present a "Dalkon Shield History" of these events, in exhibits excluded by the court. The exhibits consist of chronologies of events presented in an abbreviated form. They are allegedly based on Robins' documents. Cooper claims that these exhibits would have greatly bolstered her proof of causation. Even if these summaries were admissible, their exclusion was at most harmless error, since the jury went with her on causation.

Cooper also complains that the court erroneously excluded the testimony of two experts. Dr. Swan, according to Porter-Cooper, was going to testify on the relationship between Dalkon Shield use and the incidence of pelvic inflammatory disease and hysterectomy. Since such testimony goes to causation, its exclusion, again, was at most harmless error. Porter-Cooper argues that the second expert, Dr. Sweet, was both a causation and damage expert, but gives no explanation of how the second expert would have increased the damages awarded. Under FED. R. EVID. Rule 103 error may not be predicated on the exclusion of evidence unless there is an offer of proof providing the substance of the excluded evidence. Porter-Cooper made no such offer. She contends that her pretrial designa-

tion of Dr. Sweet's expected testimony suffices. Regarding damages, the designation states only that Dr. Sweet "may testify concerning the cause and effect of plaintiff's PID in 1971 and her PID in 1976." Such a statement is not an adequate offer of proof. An offer of proof is inadequate if "[t]here is nothing in the offer that would apprise the district court that the proffered testimony was anything but cumulative." *Strong v. Mercantile Trust Co.*, 816 F.2d 429, 431 (8th Cir.1987), cert. denied, 484 U.S. 1030 (1988). Instead, the offer must express "precisely the substance of the excluded evidence," which counsel accomplishes "by stating with specificity what he or she anticipates will be the witness' testimony" or by putting the witness on the stand. Id. at 432 & n.4.

AFFIRMED

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-0614C (6)

JANE E. PORTER-COOPER,
Plaintiff,

vs.

DALKON SHIELD CLAIMANT'S TRUST,
Defendant.

ORDER

This matter if before the Court on plaintiff's motion for a new trial, to alter or amend the judgment, for additur, and/or judgment notwithstanding the verdict. Defendant opposes the motion. After consideration,

IT IS HEREBY ORDERED that plaintiff's motion for a new trial, to alter or amend the judgment, for additur, and/or judgment notwithstanding the verdict is denied.

Dated this 17th day of March, 1994.

/s/ GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-0614C (6)

JANE PORTER-COOPER,
Plaintiff

vs.

DALKON SHIELD CLAIMANTS TRUST,
Defendant.

ORDER

This matter is before the Court on defendant Dalkon Shield Claimants Trust's motion in limine to narrow the factual issues and expedite trial. Plaintiff has filed opposition thereto.

Defendant in its motion lists several proposed stipulations, offers to give up its affirmative defense of limitations and requests the Court to limit the contested factual issues to medical causation and compensatory damages.

Upon careful consideration,

IT IS HEREBY ORDERED that defendant's motion in limine to narrow the factual issues and expedite trial shall be and it is granted inasmuch as plaintiff is unable to recover trebled, exemplary, punitive or similar damages pursuant to the Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation.

Dated this 12th day of August 1993.

/s/ GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1887EMSL

Appeal from the United States District Court
for the Eastern District of Missouri

Jane E. Porter-Cooper,
Appellant,

v.

Dalkon Shield Claimants Trust,
Appellee.

The petition for rehearing filed by the appellant has been considered by the court and is denied.

February 14, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JUN 12 1995
OFFICE OF THE CLERK

(2)

No. 94-1874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JANE PORTER-COOPER,

Petitioner,

v.

DALKON SHIELD CLAIMANTS TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit, in a unanimous *per curiam* opinion, correctly held that the trial court's determination of the disputed trial issues and exclusion of irrelevant evidence was not an abuse of discretion and was, at the very most, harmless error?

Page

TABLE OF CONTENTS

QUESTION PRESENTED. i

TABLE OF AUTHORITIES ii

OPINIONS AND ORDERS BELOW 2

STATUTES AND MISCELLANEOUS PROVISIONS. 2

STATEMENT OF THE CASE 3

THE WRIT SHOULD BE DENIED 5

I. As Recognized By The Eighth Circuit, The District Court's Evidentiary Rulings Did Not Create A Constitutional Issue Involving Petitioner's Seventh Amendment Right To Trial By Jury 5

II. The Eighth Circuit Correctly Held That The Trial Court's Determination Of The Disputed Trial Issues And Exclusion Of Irrelevant Evidence Was Not An Abuse Of Discretion And Was, At The Very Most, Harmless Error 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1561 (D. Idaho 1984) 7

FDIC v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971) 7

In re A.H. Robins Co., 88 B.R. 742 (Bankr. E.D. Va. 1988) 3

Pepsico, Inc. v. Continental Casualty Co., 640 F. Supp. 656, 665 (S.D.N.Y. 1986). 7

Statutes:

28 U.S.C. § 1332(a)(1) 3

Page

Court Rules:

Sup. Ct. R. 15.1 5

Miscellaneous:

Fed. R. Civ. P. 16(c)(1) 4, 7

Fed. R. Civ. P. 61 . . . . . 5, 8

Fed. R. Evid. 103 5

11 C. Wright and A. Miller, *Federal Practice and Procedure* §1525 at 242 (1973) 7

Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation, No. 85-01307-R, at 2 ¶9 (E.D. Va. July 1, 1991) 7

No. 94-1874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JANE PORTER-COOPER,

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DALKON SHIELD CLAIMANTS TRUST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Dalkon Shield Claimants Trust ("the Trust") respectfully submits this Brief in Opposition to Petitioner Jane Porter-Cooper's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit").

OPINIONS AND ORDERS BELOW

The Eighth Circuit's January 9, 1995 *per curiam* opinion is reported as 49 F.3d 1285 (8th Cir. 1995), and reproduced in Petitioner's Appendix ("Pet. App.") at p. A-2. The Eighth Circuit's February 14, 1995 Order denying rehearing is unreported and reproduced in Pet. App., p. A-8.

The March 17, 1994 Order of the United States District Court for the Eastern District of Missouri, denying new trial and other post-trial relief, is unreported and reproduced in Pet. App., p. A-6. The district court's August 12, 1993 Order narrowing the factual issues and expediting the trial is unreported and reproduced in Pet. App., p. A-7.

STATUTES AND MISCELLANEOUS PROVISIONS INVOLVED

AMENDED ADMINISTRATIVE ORDER NO. 1 GOVERNING DALKON SHIELD ARBITRATION AND LITIGATION, NO. 85-01307-R, AT 2 ¶9 (E.D. VA. JULY 1, 1991):

> No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.

FED. R. CIV. P. 16(C)(1):

> At any [pretrial conference] consideration may be given, and the court may take appropriate action, with respect to the formulation and simplification of the issues, including the elimination of frivolous claims or defenses.

FED. R. CIV. P. 61:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Petitioner Jane Porter-Cooper ("petitioner") filed this products liability case against the Trust pursuant to 28 U.S.C. 1332(a)(1), claiming that she sustained injuries as a result of her use of the Dalkon Shield intrauterine contraceptive device.[1]

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[1]The Trust did not manufacture or sell the Dalkon Shield. The A.H. Robins Company ("Robins") manufactured and sold the Dalkon Shield in the United States from January 1971 until June 1974, when the company suspended domestic distribution and sale of the product. Subsequently, thousands of lawsuits were brought against Robins by women who claimed injuries from use of the Dalkon Shield. Robins, in 1985, filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia (the "Virginia Court").

The Trust was established under Robins' Sixth Amended and Restated Plan of Reorganization ("the Plan"), confirmed by the Virginia Court on July 26, 1988. *In re A.H. Robins Co.*, 88 B.R. 742 (Bankr. E.D. Va. 1988). The cornerstone of the Plan is the provision for a trust fund to process the Dalkon Shield Claims perfected by filings with the bankruptcy clerk. Consummation of the Plan occurred in December 1989, when all appeals relating to

[footnote continued]

In August 1993, petitioner tried the case to a jury, arguing that two Dalkon Shields used between 1971 and 1976 caused her to sustain pelvic inflammatory disease ("PID"). She further maintained that, as a result of PID, she underwent a July 1976 hysterectomy that left her involuntarily infertile. The Trust contended that petitioner's pelvic infections were caused by exposure to sexually transmitted organisms. The Trust, maintaining that petitioner's hysterectomy was elective surgery, further contended that damages should be limited even if the Dalkon Shields used by petitioner were found to have caused her PID. The jury found for petitioner and awarded $20,000 in damages.

Petitioner appealed, and a unanimous Eighth Circuit panel[2] rejected her contention that the trial court had violated her right to trial by jury when it determined the disputed trial issues and excluded certain evidence. *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285 (8th Cir. 1995) (Pet. App., pp. A-2 to A-5).

The Eighth Circuit concluded that the district court order limiting the trial to medical causation and damages[3] was consistent with Fed. R. Civ. P. 16(c)(1). (Pet.

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the Plan were concluded and the Trust was fully funded upon the finalization of the Plan-mandated merger of Robins and American Home Products. The Trust's chief purpose is to fully, fairly, and efficiently resolve each individual Dalkon Shield claim.

[2]The Eighth Circuit panel included Chief Judge Richard S. Arnold; Circuit Judge Theodore McMillian; and Senior Circuit Judge for the Fifth Circuit, Thomas M. Reavley (sitting by designation).

[3]Prior to trial, the Trust filed a Motion in Limine to Narrow Factual Issues and Expedite Trial. In its Motion, the Trust offered to withdraw its statute of limitations defense and relieve plaintiff of the burden of proving a tort. (Pet. App., p. A-3). In addition, the Trust asked that the trial evidence be limited to the issues of causation and damages. (*Id.*). The district court granted the Motion. (Pet. App., p. A-7).

App., p. A-4). The Eighth Circuit then reviewed the excluded exhibits, which petitioner claimed would have bolstered her proof of causation.[4] The Eighth Circuit held that any error in excluding the exhibits was harmless because the jury had resolved causation in petitioner's favor. (*Id.*). Finally, pursuant to Fed. R. Civ. P. 61 (harmless errors disregarded) and Fed. R. Evid. 103 (offers of proof required), the Eighth Circuit upheld the exclusion of certain expert testimony. (*Id.* at A-4, A-5).

THE WRIT SHOULD BE DENIED

I.

AS RECOGNIZED BY THE EIGHTH CIRCUIT, THE DISTRICT COURT'S EVIDENTIARY RULINGS DID NOT CREATE A CONSTITUTIONAL ISSUE INVOLVING PETITIONER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY.

This Court should deny the Petition for a Writ of Certiorari because, despite petitioner's contentions, this case does not raise constitutional issues.[5] No constitu-

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[4] Petitioner wanted to use the exhibits to tell the "Dalkon Shield History." (Pet. App., p. A-4). The exhibits consisted of lawyer-prepared chronologies of events and were allegedly based upon Robins' documents. (*Id.*).

[5] In addition to incorrectly suggesting that this case raises constitutional questions, petitioner has made other misstatements of law and fact. *See* Sup. Ct. R. 15.1 (instructing respondents to call attention to misstatements that bear upon the question of what issues would be before the Court if certiorari were granted). First, petitioner claims that Robins "learned that its Dalkon Shield caused PID by carrying infectious fluids into the uterus." (Petition ("Pet."), p. 4). This is a misstatement. Second, petitioner misstates that the Trust answered the Complaint with a "general denial of all allegations." (Pet., p. 5). The Trust did not file a general denial. *See* Answer in *Porter-Cooper v. Dalkon Shield Claimants Trust*, No. 85-0614-C-A (E.D. Mo. filed July 21, 1992).

tional issues were raised in the district court. The district court simply granted a motion in limine and, in so doing, established the disputed trial issues. Thereafter, the district court excluded irrelevant evidence. Indeed, the Eighth Circuit explicitly found it unnecessary to address any alleged constitutional violations in the process of deciding this appeal. (Pet. App., p. A-4). Petitioner's request for a Writ of Certiorari should be denied.

Petitioner contends that the district court rulings constitute constitutional violations. Specifically, petitioner contends that she was denied her Seventh Amendment right to jury trial, despite a four-day trial that ended with a verdict in her favor. Petitioner, as she did in the court below, has grossly mischaracterized the case.

The Eighth Circuit, aware that petitioner was "*couching* her argument as a denial of her constitutional right to trial by jury," did not address that or any other constitutional issue because it recognized that there were no constitutional issues in the case. (Pet. App., p. A-4 (emphasis added)). Petitioner received a jury trial and a verdict in her favor. The Petition for a Writ of Certiorari should be denied.

II.

THE EIGHTH CIRCUIT CORRECTLY HELD THAT THE TRIAL COURT'S DETERMINATION OF THE DISPUTED TRIAL ISSUES AND EXCLUSION OF IRRELEVANT EVIDENCE WAS NOT AN ABUSE OF DISCRETION AND WAS, AT THE VERY MOST, HARMLESS ERROR.

The Eighth Circuit correctly ruled that the district court did not commit trial error and that, in any event, the alleged errors were harmless. By entering the pretrial order which limited the trial evidence to medical

causation and damages, the district court simply established the disputed trial issues. District courts are empowered to take appropriate action with respect to the "formulation" of issues during the pre-trial phase. *See* Fed. R. Civ. P. 16(c)(1).

> The reference in Rule 16(c)(1) to 'formulation' is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone.

Fed. R. Civ. P. 16(c)(1) advisory committee's note.[6] Given that petitioner was prohibited from recovering punitive or similar damages in the case,[7] entry of the

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[6]The authority to enter orders that have the effect of restricting the evidence to contested issues is supported by the case law. *See, e.g., FDIC v. Glickman,* 450 F.2d 416, 419 (9th Cir. 1971) ("A district judge is given broad discretion in supervising the pretrial phase of litigation, with a view toward sifting the issues in order that the suit will go to trial only on the questions involving honest disputes of fact or law."); *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656, 665 (S.D.N.Y. 1986) (the court, after completion of pre-trial proceedings, may "make an order limiting the issues to be tried, as contemplated by Rule 16(c)(1) Fed. R. Civ. P."); *Balla v. Idaho State Bd. of Corrections*, 595 F. Supp. 1558, 1561 (D. Idaho 1984) (court, pursuant to Rule 16(c)(1), "ordered that it would entertain evidence only upon" certain constitutional deprivations and, thereafter, set forth the "factually disputed issues" in a pretrial order); 11 C. Wright & A. Miller, *Federal Practice and Procedure* §1525 at 242 (1973) (pursuant to Rule 16(c)(1), the court is "directed to define the issues, facts, and theories actually in contention, which means that extraneous issues should be weeded out.").

[7]*See* Amended Administrative Order No. 1 Governing Dalkon Shield Arbitration and Litigation, No. 85-01307-R, at 2 ¶9 (E.D. Va. July 1, 1991), *reproduced in* Respondent's Appendix ("Resp. App."), pp. 1a-7a ("No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.").

pre-trial order was a proper exercise of judicial discretion.[8]

The Eighth Circuit also recognized that it was unnecessary to determine whether petitioner's lawyer-prepared "Dalkon Shield History" exhibits were improperly excluded at trial. Petitioner argued that such exhibits were probative on the causation issue. (Pet. App., p. A-4). Because causation was ultimately resolved in petitioner's favor,[9] any error in excluding the exhibits was harmless. *See* Fed. R. Civ. P. 61 (errors disregarded unless they affect parties' "substantial rights"). The harmless error doctrine also applies to the exclusion of Drs. Shanna Swan and Richard Sweet, both of whom would have offered causation testimony on petitioner's behalf.[10] (Pet. App., p. A-4).

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[8]The Trust, given the punitive damages prohibition and its willingness to drop the limitations defense, argued that any evidence of Robins' conduct, state of mind, or knowledge regarding the Dalkon Shield--in other words, evidence relating directly to the issues of punitive damages and accrual of petitioner's cause of action--should be excluded as irrelevant to the contested issues in the case. On appeal, the Eighth Circuit agreed that the timing and extent of Robins' knowledge of Dalkon Shield problems was not relevant. (Pet. App., p. A-4).

[9]That causation was resolved in petitioner's favor cannot be doubted. Jury Instruction No. 10 provided: "Your verdict must be for plaintiff if you believe that plaintiff was damaged as a direct result of her use of the Dalkon Shield." Appellant's Appendix ("Appt's Appx") at 42, *filed in Porter-Cooper v. Dalkon Shield Claimants Trust*, No. 94-1887 (8th Cir. filed May 31, 1994). The jury returned a verdict in favor of plaintiff-petitioner and awarded $20,000 in damages.

[10]Petitioner maintained that Dr. Sweet would have offered damages testimony as well. (Pet. App., p. A-4). The Eighth Circuit held that petitioner failed to make an adequate offer of proof. (Pet. App., pp. A-4, A-5). Petitioner does not challenge that ruling.

In this case, the harmless error doctrine presents itself as an *independent* justification for upholding the district court's evidentiary exclusions. Indeed, were the Court to grant the writ, the harmless error doctrine would likely keep the Court from reaching any substantive point. Because the decision below could be upheld without deciding the question presented in the Petition, the writ should be denied.

CONCLUSION

For all the reasons set forth above, Petitioner Jane Porter-Cooper's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Chapter 11

No. 85-01307-R

RETAIN PROCEEDING
(Judge Merhige)

In re:

A.H. ROBINS COMPANY, INCORPORATED,

Debtor.

EMPLOYER'S TAX IDENTIFICATION
No. 54-0486348

AMENDED ADMINISTRATIVE ORDER NUMBER 1 GOVERNING DALKON SHIELD ARBITRATION AND LITIGATION

For the reasons stated in the Memorandum filed in this cause on June 26, 1991, and having ascertained that the Order accompanying said Memorandum contained typographical errors and omissions, it is Adjudged and Ordered that said Order of June 26, 1991, shall be and is of no force or effect and that the instant Order is substituted therefore.

For the reasons stated in the Memorandum filed in this cause on June 26, 1991, and in accord with the Plan of Reorganization in this cause, deeming it proper so to do, it is ADJUDGED AND ORDERED as follows:

1. Every holder of a Dalkon Shield Personal Injury Claim and every person (including counsel) commencing binding arbitration or commencing or recommencing litigation of a Dalkon Shield Personal Injury Claim under Section E.5 of the Claims Resolution Facility shall be bound by this Order. (Such holders, persons and counsel are referred to herein as "Claimant"; such arbitrations and litigations are referred to herein as "Arbitration" and "Litigation";) Every Arbitration arbitrator shall likewise be bound by this Order.

2. No Claimant shall commence Arbitration or shall commence or recommence Litigation until this Court has certified by entry of an order, upon the application of the Trust, that: (i) the claims review process respecting the applicable Dalkon Shield Personal Injury Claim has been completed in accordance with the Claims Resolution Facility ("CRF"), and (ii) as a matter of law, where a Claimant intends to proceed with such Arbitration or Litigation in a venue outside the United States, the venue is appropriate and the courts of such venue and jurisdiction will honor and enforce (whether by reason of the Claimant's stipulation or otherwise) this Order and the Plan. Such certification may be revoked upon a subsequent showing that the procedures of the CRF were purposefully or materially circumvented, or that the certification was otherwise improvidently granted, in which event the applicable Arbitration or Litigation may be ordered dismissed or stayed by this Court.

3. This Court retains jurisdiction as provided by Section 8.05 of the Plan, and by applicable law, including exclusive jurisdiction as against any Arbitration or Litigation:

a. to resolve controversies and disputes regarding interpretation and implementation of the Plan, the

Trust Agreements, the CRF, the releases obtained by the Trusts (or either of them), any amendments of the Trust Agreements, and in accordance with the provisions of the CRF, any disputes relating to whether or not a timely and proper notice of claim was filed, the rights of holders of Late Claims and whether a Disallowed Claim should be reinstated;

b. to enter orders in aid of the Plan, the Trust Agreements, the CRF and releases obtained by the Trusts (or either of them), including, but not limited to, appropriate orders (which may include contempt or other sanctions) to protect the Debtor, the Successor Corporation, AHP, any of the Affiliates thereof and other Persons from actions prohibited under Article VIII of the Plan;

c. to modify the Plan pursuant to Section 9.06 of the Plan; and

d. over actions challenging the validity and enforceability of the releases and injunctions referred to in Sections 8.03 and 8.04 of the Plan.

4. The Trust shall maintain a document depository in Richmond, Virginia, containing substantially all documents which the Trust, using its best efforts, has identified as having been produced without qualification by Robins in pre-petition Dalkon Shield personal injury tort litigation. Upon reasonable written notice to the Trust, a Claimant may visit the depository at any time during working hours and will have full access to all documents and videotapes located there. A copying service will be located on or near the depository premises where copies of any document or videotape may be made at the Claimant's request and expense.

5. In addition to maintenance of the document depository described in Paragraph 4, the Trust shall, upon request, provide to a Claimant who has properly

elected Arbitration or Litigation, free of charge, the catalog that indexes materials and documents used in previous Dalkon Shield personal injury tort litigation and which was developed and compiled by the law firm formerly known as Robins, Zelle, Larson & Kaplan, with the cooperation of other attorneys throughout the country, and which was distributed by the Minnesota Trial Lawyers Association. The Claimant may obtain, at the Claimant's expense, any materials and documents from this catalog by placing an order for them directly with the copying service which maintains these catalogued materials and documents.

6. No discovery by a Claimant against any person or entity shall be conducted in connection with any Arbitration or Litigation except:

a. as provided in Paragraphs 4 and 5 above;

b. discovery against persons or entities, including doctors, hospitals and other health care providers, not a party to the Arbitration or Litigation but excluding Robins, AHP, the Successor Corporation, Aetna, any of their respective Affiliates and any of their present or former officers, directors, employees, attorneys, agents, or representatives;

c. discovery against the Trust solely through the use of interrogatories and requests for admissions which shall be limited to issues related to individual Dalkon Shield Personal Injury Claims and which shall not include issues of Trust administration, provided, however, that discovery shall be permitted against persons identified by the Trust as expert witnesses to be called by the Trust in the respective Arbitration or Litigation;

d. as provided by the rules developed by the Trust respecting Arbitration; and

e. as further ordered by this Court upon request of the Claimant.

All discovery disputes arising in Arbitration or Litigation may be resolved by this Court.

7. No Arbitration or Litigation shall be filed or proceed against any person or entity other than the Trust except as provided in Section 8.04 of the Plan respecting Unreleased Claims. No claim alleged to be an Unreleased Claim shall be asserted against any person or entity absent an order by this Court finding that such claim satisfies the provisions of Section 1.85 of the Plan.

8. Following the entry of the certification order described in Paragraph 2 above, service of process on the Trust in the respective Arbitration or Litigation may be made by certified U.S. first-class mail, return receipt requested to Linda J. Thomason, Counsel, Dalkon Shield Claimants Trust, P.O. Box 1314, Richmond, Virginia 23210. Service by this means shall be effective upon receipt by the Trust.

9. No Claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.

10. Any Claimant commencing Arbitration or commencing or recommencing Litigation shall forthwith:

a. conform all pleadings to the terms of this Order by substituting the Trust as the defendant, by deleting or dismissing all other defendants and respondents (except insofar as an order has been obtained pursuant to Paragraph 7 above, respecting an Unreleased Claim), by deleting or dismissing any claim for punitive damages and by taking all other necessary action; and

b. file this Order and the certification order described in Paragraph 2 above with the Arbitration arbitrator or Litigation court as exhibits to, and incor-

porated in, the initial pleadings commencing Arbitration or commencing or recommencing Litigation.

11. This Court may stay or order the parties to seek a stay of any Arbitration or Litigation upon a showing by the Trust (i) of undue prejudice due to the multiplicity of ongoing, pending or scheduled trials or arbitration hearings or (ii) that an Arbitration or a Litigation is proceeding in violation of this Order, in contravention of this Court's jurisdiction or in violation of the Plan.

12. The Trust, any Claimant, any arbitrator involved in, and any award resulting from, an Arbitration shall comply with the rules developed by the Trust respecting Arbitration, Judicial review, if any, of an Arbitration or an Arbitration award shall be, in the first instance, by this Court.

13. No levy against the Trustees, the Trust or its assets may be made as a result of any Arbitration or Litigation. Until further order of this Court, in order to assure the continued availability of funds to pay all valid Dalkon Shield Personal Injury Claims and in order to further the other proper purposes of the Plan, Trust and CRF, in satisfaciton of all awards or judgments (including awards or judgments of costs, fees or disbursements) obtained as a result of Arbitration or Litigation, the Trust shall:

a. pay initially only that portion of such an award or judgment which does not exceed the greater of $10,000.00 or the final settlement offer made by the Trust upon Option 3, Section E.4 of the CRF; and

b. after the payment in full of all valid, timely Dalkon Shield Personal Injury Claims which are settled under Options 1 or 2 or under Option 3, Sections E.1-4 of the CRF, or at such time as the Trustees are satisifed that all valid, timely Dalkon Shield Personal Injury Claims can be fully paid, next pay pro rata

from any Trust assets available for that purpose the unpaid balances of all Arbitration awards and Litigation judgments.

14. The Trust shall give notice by mail of the entry of this Order, accompanied by a signed copy of the Order, to all claimants holding timely or late-filed Dalkon Shield Personal Injury Claims or to their counsel, as reflected by the records of the Trust.

15. A Claimant who desires relief from this Order shall file an appropriate motion in this Court stating the particular circumstances warranting such relief.

DATE: July 1, 1991
nunc pro tunc
June 26, 1991

/s/ Robert R. Merhige, Jr.
ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

/s/ Blackwell N. Shelly
BLACKWELL N. SHELLY, per R.R.M.
UNITED STATES BANKRUPTCY JUDGE